

Employment and Training Administration, Labor

§ 655.11

(2) The wage rate established under the DBA or SCA for the occupation in the area of intended employment if the job opportunity is in an occupation for which such a wage rate has been determined; or

(3) The arithmetic mean of the wages of workers similarly employed in the occupation in the area of intended employment as determined by the OES. This computation will be based on the arithmetic mean wage of all workers in the occupation.

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(6) In geographic areas where the OES does not gather wage data, including but not limited to the jurisdiction of the Commonwealth of the Northern Mariana Islands, and there is no CBA, DBA, or SCA wage available for the job opportunity, the NPC will consider wage information in the form of a wage survey provided by an employer in making a prevailing wage determination. Such a survey may only be submitted with a request for a prevailing wage determination. A request filed under this paragraph does not need to be preceded by a request and approval to submit wage information as described in paragraph (b)(7) of this section.

(7)(i) An employer may submit a written request to the Administrator, OFLC to provide a private wage survey for OFLC to consider in making a prevailing wage determination which must demonstrate that the following factors are present:

(A) There is no CBA, DBA, or SCA wage available for the job opportunity;

(B) The job opportunity was not listed in the Dictionary of Occupational Titles (DOT) and is not listed in the Standard Occupational Classification (SOC) system, or if the job opportunity was listed in the DOT or is listed in the SOC system, the DOT crosswalk to the SOC system links to an occupational classification signifying a generalized set of occupations as "all other"; and

(C) The job description entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different, as defined in guidance to be issued by the OFLC, than those in any other SOC occupation.

(ii) The Administrator, OFLC may approve or deny an employer's written request to provide a wage survey. If the Administrator, OFLC approves the employer's written request, the Administrator, OFLC will send an approval letter to the employer. Approvals shall be valid for 1 year from the date of approval and only for the job opportunity and area of intended employment specified in the original written request. This approval does not constitute an acceptance of any particular wage survey.

(iii) If approval is granted, the employer may submit a request for a prevailing wage determination to the NPC along with a copy

of the Administrator, OFLC's approval letter and a complete copy of the private survey. The NPC will evaluate the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(iv) In each case where the employer submits a wage survey for which it seeks acceptance, the employer must provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(v) The survey must be based upon recently collected data:

(A) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(B) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(vi) The survey cannot as any part of its data wage information reflect the wages of H-2B workers or other nonimmigrant workers.

(vii) If the NPC does not approve the survey for use in the H-2B program, the NPC shall inform the employer in writing of the reasons the survey was not accepted. An employer may appeal the NPC's decision in accordance with § 655.11.

§ 655.11 Certifying officer review of prevailing wage determinations.

(a) *Request for review of prevailing wage determinations.* Any employer desiring review of a PWD must make a written request for such review within 10 days of the date from when the final PWD was issued. The request for review must be sent to the NPC postmarked no later than 10 days after the determination; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all materials submitted to the NPC for purposes of securing the PWD.

(b) *NPC review.* Upon the receipt of a written request for review, the NPC shall review the employer's request and accompanying documentation, including any supplementary material submitted by the employer.

(c) *Designations.* The Director of the NPC will determine which CO will review the employer's request for review.

(d) *Review on the record.* The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

(1) Affirm the PWD issued by the NPC; or

(2) Modify the PWD.

(e) *Request for review by BALCA.* Any employer desiring review of a CO's decision on a PWD must make a written request for review of the determination by BALCA within 30 calendar days of the date of the decision of the CO. The CO must receive the written request for BALCA review no later than the 30th day after the date of its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the decision on the PWD by the NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002.

(4) The BALCA shall handle appeals in accordance with § 655.33.

§§ 655.12–655.14 [Reserved]

§ 655.15 Required pre-filing recruitment.

(a) *Time of filing of application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations or special procedures. Applications submitted not meeting this re-

quirement shall not be accepted for processing.

(b) *General attestation obligation.* An employer must attest on the *Application for Temporary Employment Certification* to having performed all required steps of the recruitment process as specified in this section.

(c) *Retention of documentation.* The employer filing the *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts, including prevailing wage determinations, as required in this subpart and be prepared, upon written request, to submit this documentation in response to an RFI from the CO prior to the CO rendering a Final Determination or in the event of a CO-directed audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the certification.

(d) *Recruitment steps.* An employer filing an application must:

(1) Obtain a prevailing wage determination from the NPC in accordance with procedures in § 655.10;

(2) Submit a job order to the SWA serving the area of intended employment;

(3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and

(4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.

(e) *Job order.* (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall